

# League of Women Voters of Saratoga County Consensus Meeting

## LWV of the United States FEDERAL JUDICIAL STUDY

League responses are due April 14 at 6 pm

# How Study Leads to Positions

- We use our League positions to lobby people in positions of power to effect change.
- But before we advocate for an issue or cause, Leagues undertake in-depth studies at the local, state, or national level hoping to reach member agreement.

# How Study Leads to Positions

- If enough Leagues participate in the study and member consensus (agreement) is reached, we gain a new or revised position on the issue at the appropriate level – (national), and we can then advocate for that issue.

# Member Understanding

From League of Women Voters of Saratoga County Handbook:

- The clear expression of member views is at the heart of the grassroots character and effectiveness of the League of Women Voters.
- We urge members to take advantage of the information being presented so that they have a clear understanding of the issues involved.

# GOAL OF STUDY

From LWVUS Federal Judiciary Study Guide:

- To develop a LWV position on the Federal Judiciary as an essential component of US democracy.
- The Study includes but is not limited to addressing concerns and clarifying judicial accountability, transparency, independence, and ethics.

# SCOPE

From LWVUS Federal Judiciary Study Guide:

- The scope of this study focuses on the US Supreme Court and the other Article III\* federal courts to allow for a relatively quick but thorough, modernized study and adoption of a LWVUS position that is appropriate for years to come.
- \* The other Article III federal courts include 94 federal district courts (which include bankruptcy courts), and 13 circuit courts of appeals.



## **U.S. Supreme Court**

1 Court

## **U.S. Courts of Appeals**

13 Circuits (12 Regional and 1 for the Federal Circuit)

## **U.S. District Courts**

94 Districts, each with a Bankruptcy Court  
Plus  
U.S. Court of International Trade  
U.S. Court of Federal Claims

# LWVUS Positions

LWVUS positions on the Congress and the Presidency, the other two branches of government, pay little attention to specific policy approaches; instead, they focus on principles.

The principles were designed for evaluating future policy proposals to ensure a durable foundation for advocacy.



# At the End of the Presentation, We Will Consider 12 Consensus Statements

The first four consensus statements cover the basic principles outlined in the scope of the Federal Judiciary Study.

The remaining statements deal with more specific aspects of the workings of the Federal Judiciary.

- All 12 consensus statements are in the chat.

# Terms

**Accountability** - A federal court system that can hold its judges and justices responsible for their actions and decisions according to ethical and legal standards.

Currently, the Judicial Conduct and Disability Act of 1980 affords “any person” the right to file a complaint against a federal judge alleging misconduct or mental or physical disability. 28 U.S.C. §351(1).

The Act does not apply to the justices of the US Supreme Court.

# Terms

**Impartiality/ Fairness Objective** - decision-making free from bias or prejudice; precedence is followed; and everyone has equal access to the justice system.

**Independence (judicial)** - Free from the influence of the other branches of government, and free from shifting popular and political opinion.

**Openness/ Transparency** - Court proceedings and rulings open and available, to the extent possible, to preserve judicial legitimacy and to provide litigants with up-to-date guidance on what the law is.

# Terms

**Ethics (judicial)** - Judicial integrity is exemplified by following enforceable codes of conduct with effective enforcement mechanisms. Integrity includes avoidance of conflicts of interest or the appearance of conflicts; use of position for personal gain, corruption, or favoritism; proper use of recusal; and transparent financial disclosure.

# Terms

**Legitimacy (judicial)** - Judicial power relies on trust, so acceptance of the legitimacy of the judiciary is essential for acceptance of judicial decisions. Acceptance of court authority sustains general obedience to laws.

**Textualism** - An approach to legal interpretation that a statute should be interpreted according to the plain meaning of its text and not according to the intent of the legislature, the statutory purpose, or the legislative history.

# Terms

**Originalism** - An approach to judicial constitutional interpretation where the Constitution should be interpreted as it was written or understood at the time of its adoption.

**Living Constitutionalism** - A theory of constitutional interpretation that holds that the U.S. Constitution's meaning is dynamic and evolves over time, even without formal amendment. Also known as judicial pragmatism.

# Terms

**Federal Judiciary** - Article III, Section 1 of the Constitution authorizes the creation of the US federal court system to include “one Supreme Court” and such “inferior courts” that Congress chooses to “establish.”

The scope of federal judicial power is limited by the Constitution and Congress, extending only to cases or controversies arising under the Constitution and the laws of the United States.

# Terms

**Deference to Other Branches** - The judicial branch is one of three branches of the federal government, along with the legislative and executive branches, established by the US Constitution.

As such, federal courts should respect and operate within the constitutional framework balancing authority with executive and legislative branches. Judges and justices should respect the different roles of the judicial, executive, and legislative branches in gathering facts and scientific information to create, enforce, and review laws.



# Terms

**Judges vs. Justices** - Individuals who preside over the lower federal courts are called “judges,” whereas members of the highest court, the US Supreme Court, are called “justices.”

**Stability of law** - Stability of the law comes from adherence to precedent— -- stare decisis (“to stand by things decided” in similar cases)— -- which promotes evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to actual and perceived integrity of the judicial process.

# Terms

**Judicial Activism** - A philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent.

**Judicial Restraint** - In contrast to judicial activism, judicial restraint is a philosophy that follows a more strict and literal approach to constitutional interpretation. Judicial restraint is characterized by a focus on stare decisis and a reluctance to reinterpret the law. Also, the principle that when a court can resolve a case based on a particular issue, it should do so without reaching unnecessary issues.

# Terms

**Procedural Fairness** - This includes the traditional elements of “due process,” including such things as litigants having the opportunity to present their case, to confront and cross-examine opposing witnesses, and to trial by jury. In most cases litigants have the right to notice and an opportunity to be heard as well as the right to present a case, a jury trial, etc.

**Representativeness** - A court system, including judges, justices, and court staff who possess diverse professional experience/outlook and demographics which reflect the population of the United States.

# Pause

## Are all the terms understood?

We will now explore five of the policy papers that will assist us in responding to the consensus statements.

Each policy paper ends with a list of overriding principles associated with the issues covered in the policy.

These principles will relate to the consensus statements we will be considering.

# Judicial Ethics and Enforcement

(1 of 11)

The Federal Judiciary lacks a single set of rules governing judicial ethics or enforcement.

## Judicial Ethics for Federal judges (other than SCOTUS)

Since 1973 the United States Judicial Conference has composed and updated a Code of Conduct directed to all federal judges other than SCOTUS.

# Judicial Ethics and Enforcement

(2 of 11)

The Code of Conduct provides guidance for judges in issues of judicial integrity and independence, judicial diligence and impartiality, permissible extra-judicial activities, and the avoidance of impropriety or the appearance of such.

An associated statute 28 USC 455 includes the following:

- 1) Any justice, judge, or magistrate of the US shall disqualify himself in any proceeding in which his impartiality might be reasonably questioned.
- 2) And includes provisions for specific requirements for recusal.

# Judicial Ethics and Enforcement

(4 of 11)

The Judicial Conduct and Disability Act of 1980 provides a complaint and disciplinary framework for federal judges and provides for:

- 1) Sanctions for conduct that does not rise to impeachment
- 2) The ability to file a complaint against a federal judge alleging that the judge “engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts” or “is unable to discharge all the duties of office by reason of mental or physical disability.”



## Judicial Ethics for the Supreme Court

According to Politico, 75% of voters support a binding ethics code for SCOTUS. They are the only members of the federal judiciary not covered by a code of conduct.

## KEY ISSUES:

Justices say they consult the code of conduct for Federal III judges but with little evidence.

In 2023 SCOTUS announced a voluntary code of their own making that includes exceptions.

There is no enforcement mechanism - Each justice decides for themselves whether to recuse or not and when they do, it is typically without explanation.

Two methods have been proposed to get to a code of conduct for SCOTUS

1) Internal disciplinary procedures would leave the Justices to police themselves, a matter which they have resisted directly and indirectly.

2) External imposition by Congressional statute could direct the Judicial Conference to craft a code for SCOTUS or make the existing codes apply. Potential problems with using lower courts rules to apply to SCOTUS: inferior judges would be evaluating Justices higher up the hierarchy and allowing “any person” to file a complaint opens up potential for abuse.

Still doesn't address enforcement.

## Proposals for recusal of SCOTUS:

- 1) Require justices to state reasons for recusal or failure to recuse.
- 2) Establish a formal procedure for recusal decisions to be reviewed by another Justice or Justices or entire Court.
- 3) Reform recusal laws to make it easier for Justices to avoid financial conflicts.

## Proposals for recusal:

Scholars and organizations disagree (largely along political lines) on Congress' constitutional authority to impose an enforceable ethics code on SCOTUS. No consensus has yet been found in Congress either.

# Judicial Ethics and Enforcement

(11 of 11)

Overriding principles associated with the issues of ethics and ethics enforcement include:

- Judicial independence
- Judicial transparency
- Legitimacy
- Judicial accountability
- Judicial ethics

# Recusal – Policy Paper

(1 of 4)

Defined as the withdrawal of a judge from a case on the grounds that they are not the appropriate judicial officer to handle that case because of a possible conflict of interest or lack of impartiality whether perceived or actual.

Federal Judicial Code of Conduct 3C clearly sets forth the specifics which are many but can be summarized by:

- 1) personal bias or prejudice
- 2) the judge served as a lawyer in the matter in controversy or has been associated with such a lawyer



# Recusal – Policy Paper

(2 of 4)

## Federal Judicial Code of Conduct 3C specifics - continued

- 3) a financial interest in the issue at hand which also pertains to his or her spouse and minor children
- 4) in-depth involvement in a similar case
- 5) expression of an opinion on this case.

# Recusal – Policy Paper

(3 of 4)

This code does not apply to the Supreme Court which issued its own code in 2023 with one striking complication: the “duty to sit” which requires the justice to participate unless disqualified as an even number of justices could create gridlock.

Neither code has an enforcement mechanism.

# Recusal – Policy Paper

(4 of 4)

The decision for whether a judge should recuse from a case encompasses several principles within the scope of the Federal Judicial Study, including:

- Judicial ethics
- Transparency
- Legitimacy
- Judicial accountability
- Nonpartisanship
- Independence

# Shadow Docket - Policy Paper

(1 of 6)

The US Supreme Court issues rulings in two ways: written opinions and orders.

The written rulings represent only about 1% of the Court's total output in any year (so-called merit cases amount to about 70). The remaining 99% are issued as orders, that, by tradition, are unsigned and unexplained.

# Shadow Docket - Policy Paper

(2 of 6)

Some say orders now constitute a shadow docket that is being used to substantively block or unblock everything-from national and state policy concerning immigration, vaccinations, reproductive rights, affirmative action, racial gerrymandering, and voting rights.

Cases on the shadow docket go through an accelerated decision-making process without full briefs, oral arguments, and lengthy opinion.

# Shadow Docket - Policy Paper

(3 of 6)

These “orders” are issued in one of two contexts:

- 1) Granting “emergency relief” in order to freeze a policy or ruling during an appeal, about 4,000 a year or
- 2) Denying “certiorari before judgement” (refusing to hear an appeal). - This is a mechanism that allows district courts to bypass federal courts of appeal and seek an expedited ruling from the SC (only requires a minimum of 4 justices.)

# Shadow Docket - Policy Paper

(4 of 6)

Recently, the Supreme Court's use of orders has dramatically increased.

- Between 1988 and 2004, the Court granted “certiorari before judgement” three times.
- From 2005 to 2019, none were granted.
- Since 2019 the Court has granted at least 21 petitions for accelerated appeals.
- The frequency of this practice—never publicly justified—has resulted in the much scrutinized “shadow docket.”

# Shadow Docket - Policy Paper

(5 of 6)

Because the cases are being litigated elsewhere and are typically in an early stage of the litigation process:

- There is no formal record of proceedings in a trial court
- There are likely not any findings of fact from a trial court
- There is often no legal ruling on the merits from a trial or appellate court; and
- Votes of individual justices are not reported. The Court typically issues unsigned orders in its name without stating reasons for the outcome or the legal standards that were applied to grant (or deny) emergency relief. Few written dissents are filed or noted.



# Shadow Docket - Policy Paper

(6 of 6)

Principles that pertain to the shadow docket and its effects include the following:

- Judicial independence
- Nonpartisanship
- Legitimacy
- Fairness/impartiality
- Judicial restraint
- Transparency
- Stability of law

# Supreme Court Legitimacy – Policy Paper (1 of 7)

Why is legitimacy important?

“.....when a government institution or organization lacks legitimacy, it may no longer be worthy of respect or obedience.”

# Supreme Court Legitimacy – Policy Paper (2 of 7)

**Background** - In Marbury vs Madison (1803), the SC struck down an act of Congress as unconstitutional for the first time in US history.

Since then, the Court has been the chief interpreter of the Constitution, with authority to overrule actions of the other two branches of government.

Yet, it has no power to enforce those decisions as witnessed when Andrew Jackson said in response to an unfavorable ruling in 1834: "Chief Justice John Marshall has made his decision: now let him enforce it."

# Supreme Court Legitimacy – Policy Paper (3 of 7)

If the SC can't enforce its decisions, what happens?

In the past, the executive branch has stepped in (Brown v Board of Education) to desegregate schools.

More recently, in Allen v Milligan, the SC upheld section 2 of the Voting Rights Act and ruled that Alabama's 2021 congressional map illegally diluted the voting power of Black Alabamians. Alabama did not comply with the Court's ruling, so a special master was assigned.

# Supreme Court Legitimacy – Policy Paper (4 of 7)

## How is legitimacy measured?

Current calls for supreme court reform are an indicator-or for some, a flashing red light-that the Court's legitimacy is under siege. By 2024, disapproval reached an all-time high. Some attribute this as a reaction to the Dobbs decision but began with Citizens United (2010) and Shelby v Holder (2013).

# Supreme Court Legitimacy – Policy Paper (5 of 7)

But many other reasons underlie the Court's legitimacy problems and current calls for reform. These include:

- 1) Politicization of the Court and the nomination process
- 2) Ethics scandals
- 3) Lack of transparency in Court rulings (from increased reliance on the shadow docket); and
- 4) Failure of the Court to acknowledge and respond to its growing crisis of legitimacy.

# Supreme Court Legitimacy – Policy Paper (6 of 7)

A proposal came up at the LWVUS Town Meeting in February which suggested that term limits be set. Given that the population is living older, it is likely justices will serve a much longer tenure than previously and be significantly older.

A term limit of 18 years was recommended and would be staggered so that each president would have the opportunity to appoint 2 justices. This would remove the difficulties of having one's choices arbitrarily not voted on (Merrit Garland).

# Supreme Court Legitimacy – Policy Paper (7 of 7)

Similarly, for the Supreme Court, issues of legitimacy focus not on particular rulings but on principles:

- Judicial accountability
- Ethics
- Legitimacy
- Stability of law
- Transparency
- Decision-making capability
- Nonpartisanship



# Structural Reforms – Policy Paper

(1 of 6)

Some structural reforms would require amendments to the US Constitution, which the Founders made notoriously difficult to do.

Others are within the purview of Congress or could slip through a carefully threaded constitutional loophole.

There are two frequently proposed areas for reform: expanding the size of the Supreme Court and term limits.

# Structural Reforms – Size of the Court

(2 of 6)

Today, we have a longstanding norm, neither law nor constitutional prohibition, against altering the number of justices on the SCOTUS.

Changing the size of SCOTUS is one structural reform option that could be accomplished by Congress with no change to the Constitution.

In fact, the constitutionality of this reform has been demonstrated by Congress eight separate times from 1789 to 1889 (minimum number of justices 5; maximum 10; 9 justices since 1889).

# Structural Reforms – Size of the Court

(3 of 6)

Regardless of the rationale, any congressional action to alter the number of justices would require:

- Congressional majorities in the House and Senate (potentially, 60 votes in the Senate).
- A transition plan to avoid making an already-political problem worse.

# Structural Reforms – Term Limits

(4 of 6)

The Constitution clearly specifies lifetime tenure under “good Behaviour” for the federal judiciary with compensation not reduced during time in office. Removal requires impeachment, a near impossibility.

There are numerous arguments in favor and against term limits. **But could term limits even be accomplished without constitutional amendment?**

# Structural Reforms – Term Limits

(5 of 6)

One detailed bipartisan proposal says yes. It recommends 18-year terms that could be defined by statute without amending the Constitution.

The unusual nature of this proposal — in addition to being bipartisan — is that it addresses nearly all the pros and cons related to term limits and could address other related issues with SCOTUS.

This proposal fits within constitutional boundaries by redefining the roles Supreme Court justices play within their life tenure, not by changing the life tenure provision.

# Structural Reforms

(6 of 6)

Principles that recur in these two reform proposals — pro and con — include the following:

- Judicial independence
- Representativeness
- Decision making capability
- Nonpartisanship
- Judicial accountability
- Effectiveness
- Legitimacy
- Stability of law

# Stop

Questions or comments that will aid in understanding the policies

Before we enter into the consensus portion

# CONSENSUS DISCUSSION

- Consensus is the sense of the room. It is not a vote. Ideally, consensus should be reached through discussion, with a full exploration of all the qualifying factors, to identify broad areas of agreement.
- (That said, at times a show of hands may become necessary. A show of hands can be important in recording substantial minority opinion, or it may show that there is no consensus).



# CONSENSUS DISCUSSION

Every League that conducts a consensus meeting will answer the same set of consensus questions. Those answers will be used to write the new LWVUS position on the Federal Judiciary. That is our goal.

# CONSENSUS QUESTIONS

The first four consensus statements for your consideration and discussion cover the basic principles outlined in the scope of the Federal Judiciary Study.

We will consider all 4 together.

1. Transparency is essential to an effective Federal Judiciary.

## 2. Accountability is essential to an effective Federal Judiciary.

### 3. Independence is essential to an effective Federal Judiciary.

# 4. Ethics is essential to an effective Federal Judiciary.

# CONSENSUS QUESTIONS

The remaining statements deal with more specific aspects of the workings of the Federal Judiciary.

5. There should be binding universal standards of conduct for judges and Justices at all levels of the Federal courts.



6. Court hearings, documents filed in the court, and rulings for all federal cases should be open and available to the public.

7. There should be an effective enforcement mechanism for the Federal Judiciary code of ethics at all levels.

8. An enforcement mechanism should include a process to require a judge or Justice to recuse him or herself when a reasonable litigant would believe that the judge or Justice has a bias against any party or an issue raised in the case.

9. A judge or Justice's decision and rationale to recuse or not recuse should be publicly disclosed in writing.

10. Federal judges and Justices should be subject to rigorous financial disclosure requirements, enforcement, and penalties for all financial benefits, including but not limited to income, gifts, paid speaking engagements, and book deals.

11. Stability of law (stare decisis) is a value that contributes to a strong democracy.

Stare decisis – a legal term that requires courts to follow previous court decisions when deciding similar cases. Latin for “to stand by things decided”.

- a fundamental concept in the American legal system

12. Public perception of the Supreme Court's legitimacy contributes to a strong democracy.



# Thank you for participating!

League of Women Voters of Saratoga County  
Consensus Meeting

**LWV of the United States**  
**FEDERAL JUDICIAL STUDY**